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SEEMA JAYA SDN BHD & ANOR v. CIMB BANK BHD

HIGH COURT MALAYA, IPOH
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: 22NCVC-91-08-2014]
2 JUNE 2015

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LAND LAW: *Sale of land – Auction – Challenge as to valuation – Allegation that property sold at undervalue – Whether challenge should have been raised in foreclosure proceedings – Whether undervalue was so gross as to indicate fraud or want of proper standards of care*

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CIVIL PROCEDURE: *Action – Res judicata – Matters which could and should reasonably have been raised in earlier proceedings – Sale of property by way of auction – Challenge as to valuation – Allegation that property sold at undervalue – Whether challenge should have been raised in foreclosure proceedings – Whether chargor estopped from challenging valuation by way of fresh action*

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The first plaintiff charged 51 lots of land to the defendant as security for a loan advanced to the second plaintiff. When the second plaintiff defaulted in its payments of the loan instalments, the defendant obtained a default judgment against the first plaintiff and proceeded with foreclosure proceedings. The defendant obtained an order for sale and the property was ordered to be sold by public auction. Based on a valuation report presented by the defendant, the auction was fixed at the reserve price of RM400,000. Prior to the auction date, the first plaintiff's representative notified the defendant, *via* a letter, that a purchaser agreed to purchase the property from the second plaintiff for RM1.6 million and had paid the deposit. The first plaintiff's representative undertook that the first plaintiff would pay the amount outstanding on or before the date of the auction. However, the property was sold at RM404,000 at the public auction. The plaintiffs thus commenced the action against the defendant for damages for having sold the charged property at an undervalue. The plaintiffs alleged the defendant had breached its duty to act in good faith and take reasonable precautions to obtain the true market value of the charged property at the date on which it was sold. The issue before the court was whether the plaintiffs' claim was barred by *res judicata*, and if not, whether the property was sold below market value.

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Held (dismissing claim with costs):

(1) A fresh action to challenge any other order made in foreclosure proceedings can only be maintained where it was not permissible or open to a chargor to raise certain facts to oppose the impugned orders. In such a case, the chargor would be entitled to bring a fresh action based on the facts that did not avail him in the foreclosure proceedings. The facts relied on by the plaintiffs herein to challenge the defendant's valuation could have been raised at the hearing of the application before

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the Registrar but the chargor did not avail itself of the right. It was in the public interest that there should be finality to litigation and only exceptionally can decisions and judgments that are plainly *res judicata* be reopened. In this case, there were no exceptional circumstances as the facts on which the plaintiffs sought to challenge the valuation could have been ventilated in the foreclosure proceedings. (paras 14 & 15)

(2) The plaintiffs' lack of diligence in availing themselves of the opportunity to dispute the valuation of the defendant in the foreclosure proceedings was difficult to fathom as they were represented by solicitors. It was not clear why an application was not made to stay the auction if there was a purchaser willing to pay RM1.6 million for the property. In the circumstances, the plaintiff was estopped from challenging the valuation by bringing a fresh action. (para 17)

(3) It is trite that a chargee, in exercising the power to sell under the National Land Code, owes a duty to a chargor which flows from equity's recognition that the chargor has an interest in any surplus (if any) arising from the sale. The disparities in the valuations were not evidence of negligence. A chargor who alleges that his property was sold at an undervalue must prove that the undervalue was so gross as to indicate fraud or want of proper standards of care. (paras 19 & 23)

(4) A chargee is only required to seek further valuation where there is reasonable basis on which the first valuation could be challenged. There is no obligation on a chargee to postpone an auction and seek a further valuation in the absence of any challenge to its valuation. The plaintiffs failed to show that the valuation done by the defendant's valuer was flawed and did not represent the true market value of the property at the time of the sale. Hence, the plaintiff's argument that the bank acted in breach of its duties by failing to seek further valuation was without any basis and must be rejected. (paras 23, 30 & 32)

Case(s) referred to:

Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109 HC ***(refd)***

Caribbean Banking Corporation v. Alpheus Jacobs HCVAP 2004/010 ***(refd)***

CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd [2014] 9 CLJ 1012 FC ***(refd)***

Cuckmere Brick Co Ltd v. Mutual Finance Ltd [1971] Ch 949 ***(refd)***

Kandiah Peter Kandiah v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(refd)***

Malayan Banking Bhd v. Lim Poh Ho & Anor [1997] 2 CLJ 516 CA ***(refd)***

People Realty Sdn Bhd v. Hong Leong Bank Bhd & Anor [2008] 1 CLJ 73 CA ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(not foll)***

For the plaintiffs - Francis Sinnappan (Dominic Selvam with him); M/s Francis & Co
For the defendant - Purshotamdas Nathermal (Shahrir Abdul Karim with him); M/s Lalchand & Nawawi

Reported by S Barathi

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JUDGMENT

SM Komathy Suppiah JC:

Introduction

[1] This is an action by which a chargor and a borrower claim damages from their chargee for having sold the charged property at allegedly an undervalue. They based their claim on the allegation that in so doing the chargee breached its duty to act in good faith and take reasonable precautions to obtain the true market value of the charged property at the date on which it was sold.

[2] By its defence, the chargee alleged that the claim was barred by *res judicata* as the chargor did not dispute the estimated market value opined in the valuation report prepared by its valuer in the foreclosure proceedings. Having failed to do so, it was not open to the chargor and the borrower to dispute the valuation by bringing a fresh action. The chargee also denied that the charged property was sold at an undervalued price.

The Trial

[3] There was no dispute on the facts save and except in relation to the market value of the charged property. In this connection, the plaintiffs produced two valuation reports that were prepared about one month after the auction sale. The first report was prepared by Shahrol Amin bin Shahidan (PW1) and the second by Henry Arther a/l Devasagayam (PW5). Their valuations estimated the market value of the charged property to be between RM1.6 and 1.73 million.

The Facts

[4] The undisputed evidence disclosed that sometime in June 2001, the first plaintiff, Seema Jaya Sdn Bhd, charged 51 lots of land held under PT 16110 to PT 16160 ("the property") to the defendant as security for a loan of RM 700,000 advanced to the second plaintiff, Seema Development Sdn Bhd. When the second plaintiff defaulted on its payments of the loan instalments, the defendant obtained a default judgment against the former on 4 January 2013.

[5] Thereafter, the defendant commenced foreclosure proceedings against the first plaintiff to obtain an order for sale of the property by public auction. On 22 July 2013, the first plaintiff's representative, one Ong Chin Hwa (PW3) attended court and requested for a five month adjournment of the foreclosure proceedings to enable it to sell the property to a third party by a private treaty. On the defendant's objection, the court refused the adjournment and ordered that the property be sold by public auction on 16 December 2013.

[6] The defendant thereupon filed an application for directions, among others, to fix the reserve price for the sale of the property by public auction. It relied on a valuation report dated 7 May 2013, prepared on its behalf by CH Williams Talhar & Wong, a firm of licensed valuers and appraisers who opined that the market value of the property was RM400,000. On 30 September 2013, the Registrar fixed the auction on 17 December 2013 and the reserve price at RM400,000 in reliance on the said valuation report in the absence of the plaintiffs who had been duly served with the application.

[7] By letter dated 12 September 2013, the second plaintiff through its solicitors requested for a redemption statement. The defendant replied *vide* letter dated 14 October 2013 that the amount outstanding was RM1,267,224.65 but it was prepared to accept RM 976,000 as full and final settlement subject to the payment of RM 70,000.00 on or before 31 October 2013 and the other conditions mentioned in the letter.

[8] On 16 December 2013 the defendant received a letter from Ong Chin Wah that stated that Koperasi Kesatuan Guru Guru Melayu Malaysia Barat Berhad had agreed to purchase the property from the second plaintiff for RM1.6 million and had paid a sum of RM16,000 as deposit and the sale and purchase agreement was in the process of being prepared. He further undertook that the first plaintiff would pay the amount outstanding on or before the date of the auction. The defendant intimated that the public auction would proceed as the first plaintiff had failed to comply with the conditions stated in the letter of 14 October 2013.

[9] On 17 December 2013, the property was sold by public auction at RM404,000. On 26 August 2014, the plaintiffs commenced the present action against the defendant.

The Issues

[10] The issue before me is therefore, whether the plaintiffs claim is barred by *res judicata* and if not, whether the property was indeed sold below market value.

Issue 1: Whether The Plaintiffs Claim Is Barred By Res Judicata

[11] It is common ground that in the foreclosure proceedings, the Registrar accepted the market value expressed in the defendant's valuation report and fixed the reserve price at RM400,000. Mr Purshotamdas Nathermal ("Mr Das") for the defendant, contended that if the plaintiffs disagreed with the estimation of the defendant's licensed valuer, they could and ought to have filed an affidavit to oppose the defendant's application to fix the reserve price at RM400,000 and produced their own valuation. In the alternative, they could have appealed against the decision of the Registrar when she fixed

A the market value at RM400,000. Mr Das contended that the complete lack of diligence shown by the chargor and the borrower barred them from bringing a fresh action to now challenge the valuation.

[12] In response, Mr Dominic Selvam for the plaintiffs, contended that the above submission was untenable in the light of the judgment of the Supreme B Court in *Kandiah Peter Kandiah v. Public Bank Bhd* [1993] 4 CLJ 332; [1994] 1 MLJ 119 which laid down the proposition that *res judicata* has no application in foreclosure proceedings. He argued that the right of a chargor to commence a fresh action against a chargee for damages if his property was sold at an undervalue was exemplified by the decision of the Court of Appeal C in *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 2 CLJ 516; [1997] 1 MLJ 662.

[13] The authorities on the right of a chargor to bring a fresh action against the chargee were reviewed by the Federal Court in a recent judgment in *CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd* [2014] 9 CLJ 1012; D [2014] 6 MLJ 779. It observed that the decision in *Kandiah Peter* has been misunderstood and the case is not authority for the proposition that the doctrine of the *res judicata* has no application in foreclosure proceedings. The following passage in the judgment of Jeffrey Tan FCJ is instructive:

> E Hence, the action below for a declaration that the charge is not indefeasible within the meaning of s. 340(2) of the National Land Code, 'that the charge is null and void', 'that the charge, the instrument and the memorial are invalid', 'that the charge, the instrument and the memorial be set aside', and, 'that the order for sale dated 16 July 2007, the auction and other related orders in respect of the land made in the Kuala Lumpur F High Court OS proceedings (Suit No S-24-2394 of 2005) be set aside', which attacked the indefeasibility of the charge, was not an action *in personam* but an action *in rem* and which could not be brought. *Kandiah Peter pronounced that an action in personam could be brought, that is, if the action in personam is 'based upon the same facts that did not avail (the chargor) in opposing the application under s. 256'. But the present action was an action in rem that was* G *based moreover on facts that were not raised in the foreclosure proceedings. Given so, Kandiah Peter could not apply, just as Badiaddin was wholly inapplicable*.
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> With respect, it was so plain and obvious that the instant action was barred by the doctrine of *res judicata*. Foreclosure proceedings result in the grant or refusal of an order for sale, and not in a judgment or decree. But an order for sale, once granted and unless set aside, is nonetheless a final H order (see *Mui Bank Bhd v. Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642, at p. 649; [1992] 1 CLJ (Rep) 222, at p 223, where it was held by the Federal Court that the order for sale, once drawn and perfected, was a final order). When the appeal against the instant order for sale was dismissed and there was no further appeal, the stage was reached where I the instant order for sale had been fully adjudicated and therefore could not be re-litigated. The instant order for sale could be re-litigated if it were

a contravention that defied a substantive statutory prohibition. But there was no such contravention as could have permitted the respondent to bring an action *in rem*, an action which raised only issues that should have been raised in the charge action. There was also no allegation that the order for sale was procured by fraud which could have permitted a fresh action. Under the doctrine of *res judicata*, the action below should have been struck out.

(emphasis added)

[14] I do not agree with counsel for the plaintiffs that the decision in *CIMB Investment Bank (supra)* only precludes a chargor from challenging the validity of a final order for sale in a fresh action. In my judgment, it applies to all orders made in the foreclosure proceedings. The pronouncement by the Federal Court that an order for sale action that can be challenged by a fresh action must based upon the same facts that did not avail the chargor in the foreclosure action would apply to all orders made in the foreclosure action. This would necessarily mean that a fresh action to challenge any other order made in foreclosure proceedings can only be maintained where it was not permissible or open to a chargor to raise certain facts to oppose the impugned orders. In such a case, the chargor would be entitled to bring a fresh action based on these facts that did not avail him in the foreclosure proceedings.

[15] In the present case, the facts relied on by the plaintiffs to challenge the defendant's valuation could have been raised at the hearing of the application before the Registrar but the chargor did not avail itself of this right. It is in the public interest that there should be finality to litigation and only exceptionally can decisions and judgments that are plainly *res judicata* be reopened. I find no exceptional circumstances in this case as the facts on which the plaintiffs seek to challenge the valuation could have been ventilated in the foreclosure proceedings.

[16] In fact a perusal of the authorities cited by both counsel demonstrates that in cases where the valuation of the charged property was challenged by the chargor after the auction sale, no fresh action was filed but an application was made to set aside the auction sale on this ground. In *People Realty Sdn Bhd v. Hong Leong Bank Bhd & Anor* [2008] 1 CLJ 73, the appellant appealed against the dismissal of its application to set aside the auction sale of its land. The appellant claimed that the valuation report relied by the Registrar to fix the reserve price was unreliable and therefore the sale of the land was not done at a fair market value. In dismissing the appeal, the Court of Appeal held that in the absence of any affidavit evidence or valuation report to challenge the respondent's valuation, it was not open to the appellant to now challenge the derivation of the reserve price.

[17] The plaintiffs' lack of diligence in availing themselves of the opportunity to dispute the valuation of the defendant in the foreclosure proceedings is difficult to fathom as they were represented by solicitors. It is not clear why an application was not made to stay the auction if there was

a purchaser willing to pay RM1.6 million for the property. In the circumstances, I am inclined to agree with the defendant that the plaintiff is estopped from now challenging the valuation by bringing a fresh action.

[18] In the event I am wrong in my conclusion that the claim is barred by *res judicata*, I proceed to consider the next issue.

Second Issue

[19] The next issue concerns the question of whether the valuation report prepared by the defendant's valuer is flawed and therefore the sale of the property was not done at market value. It is trite that a chargee in exercising the power to sell under the National Land Code owes a duty to a chargor which flows from equity's recognition that the chargor has an interest in any surplus (if any) arising from the sale. See *Asia Commercial Finance (M) Bhd & Anor v. Development & Realtor Sdn Bhd* [1992] 2 CLJ 1175; [1992] 2 CLJ (Rep) 109; [1992] 2 MLJ 504.

[20] In *Malayan Banking Bhd v. Lim Poh Ho (supra* at [12]) the Court of Appeal stated that the chargee had two distinct duties in exercising the power of sale: first it must act in good faith; next, it must take reasonable care to obtain whatever is the true market value of the charged property at the time of the sale. In this connection, I refer to the *dictum* of Mahadev Shanker JCA at 532 (CLJ); 675 (MLJ):

> As for proof of damage, it can never be enough for the mortgagor to make a bare assertion that the price was too low even if he calls a valuer to say so because the 'true market value' or the 'best price' of a property is not what the mortgagor or his valuer thinks it is, because this is evidence of opinion not fact. The highest price a real buyer was willing to pay in the circumstances has to be judicially determined on the basis of relevant evidence. ...
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> To reinforce what was said by Edgar Joseph Jr J in Asia Commercial Finance (M) Bhd at p 517 of his decision on the need to prove that the under value was so gross as to indicate fraud or want of proper standards of care, I would with respect adopt the remarks by Mr Peter Butt at p 181 of his article. It reads:
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> > On the other hand, it is also beyond doubt that a mortgagee may not exercise the power of sale in a fraudulent manner. It has been said that the price realised may be so low as to be in itself evidence of fraud on the part of the mortgagee, but it is clear from the decided cases that the quantum realised, although relevant, will not normally be conclusive. It is only an exceptionally low price which, *per se*, conclusively demonstrates fraud (as, for example, where a property worth $1,600 was sold for twenty-five cents, one worth $5,500 was sold for $50, and one worth between $13,000 and $19,000 was sold for $1,000). Generally, inadequacy of price will need to be coupled with other factors, such as inadequate marketing or knowledge, that another buyer may be prepared to

> pay a better price, before the sale will be set aside. In any case, the value of real estate is largely a matter of opinion, and it is to be expected that the mortgagor may have an inflated idea of its worth, while the buyer naturally takes a conservative view of the value of what he is buying.

[21] In *Caribbean Banking Corporation v. Alpheus Jacobs* HCVAP 2004/010, a decision from the West Indies, it was observed:

> The first question therefore, to be answered in determining whether the bank acted in breach of its statutory duties in accepting the valuation by Mr. Smith, is whether Mr Smith was negligent in his valuation. As illustrated by the *dicta* from Cuckmere Brick Co above, the mere fact that this valuation differed significantly from that of Mr Farrell is not conclusive. The respondent's argument that the properties were sold at an undervalue because of the disparities in the valuations is therefore, circular and I do not accept it. It follows therefore, that his conclusion that the bank acted in breach of its duties by failing to seek a further valuation, which is based on this circular argument, must also be rejected. The true position must be that the bank was only obliged to disregard Mr Smith's valuation, if it was incorrect. Once there was no reasonable basis on which this valuation could be challenged, a bank acting reasonably would not need to disregard it and as a consequence seek a further valuation.

[22] In *Cuckmere Brick Co Ltd v. Mutual Finance Ltd*, Salmon LJ said (at [1971] Ch 949, 959; [1971] 2 All ER 633, 638):

> The valuation of a plot of land depends upon the knowledge, experience, expertise and ability of the valuer. Valuation is not an exact science. Equally careful and competent valuers may differ within fairly wide limits about the value of any piece of land.

[23] It is clear from the authorities quoted above that disparities in the valuations is not evidence of negligence. A chargor who alleges his property was sold at an undervalue must prove that the undervalue was so gross as to indicate fraud or want of proper standards of care. A chargee is only required to seek a further valuation where there is reasonable basis on which the first valuation could be challenged.

[24] Reverting to the facts of the present case, as observed earlier, the plaintiffs relied on two valuation reports prepared by PW1 and PW5 to challenge the validity of the defendant's valuation. It was contended by Mr Selvam that the preparation of the valuation reports about a month after the auction did not render their reports invalid or inaccurate as contended by Mr Das. He argued that Shahrol Amin and Henry Arther were experienced and licensed valuers and their reports and their estimation of the market value of RM1.6 million and RM1.73 million should be preferred to the defendant's valuation for three principal reasons. First, it was never put to the defendant's valuers that their valuations did not reflect the market value of the property, and, secondly, the defendant's valuation in reality was

done by one Ahmad Ramdan bin Ismail (DW1) an unqualified valuer. Thirdly, the defendant had not acted in good faith and had been negligent in proceeding with the auction when it knew that the plaintiffs had a potential purchaser for RM1.6 million.

[25] I shall now address the points raised by the plaintiffs *in seriatim*.

Failure To Put To PW1 And PW5 That Their Valuation Were Erroneous

[26] On the first point, it is not true that during cross-examination, it was not expressly put to the defendant's valuers that their valuations did not reflect the market value of the property. I am unable to agree with counsel for the plaintiffs that the decision in *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1996] 3 AMR 3506, is authority for the proposition that a failure of a party to expressly put to his opponent's witness during his cross-examination that his evidence on a critical issue was not true is fatal and prevents the party from challenging the evidence in submission. On the contrary, the principle in that case is that a witness whose credibility is to be impeached must be challenged in cross-examination. Failure to do so will be treated as an acceptance of that part of his evidence. As the testimony of the plaintiffs two valuers was extensively challenged in cross-examination, the principle has no application here. I therefore reject the plaintiffs' submission on this point.

Whether Defendant's Valuation Was In Fact Done By Unqualified Valuer

[27] The second issue raised by the plaintiffs was that the defendant's valuation report was defective as it was done by Ahmad Ramdan, an unqualified valuer. It is true that Ahmad Ramdan was not a qualified valuer. This submission was mounted on the fact that it was Ahmad Ramdan who in fact visited the site to inspect the subject property and prepared a draft valuation. The valuation report that was produced in the foreclosure proceedings was not signed by Ahmad Ramdan but one Heng Kiang Hai (DW3), a registered valuer with CH Williams Talhar & Wong. Heng Kiang Hai admitted that he did not inspect the subject property but explained that it was only upon being satisfied that the calculations done by Ahmad Ramdan were correct that he affixed his signature on the report.

[28] I find myself unable to agree with counsel for the plaintiffs that as it was Ahmad Ramdan who inspected the property and prepared the draft valuation, he was the maker of the report and not DW3. I find no merit in this submission. It is important to note that it was DW3 who had perused the draft and finalised it. In any event, it to be noted that Standard 8.2.2 (a) of the Malaysian Valuation Standard allows a valuer or his designated assistant to inspect the subject property.

Whether The Defendant Ought To Have Postponed The Auction

[29] It was also contended by the plaintiffs that the defendant had not acted in good faith and had been negligent as it had notice that the plaintiffs had a purchaser who was keen to purchase the property for RM1.6 million. It is not in dispute that on the date of the public auction, the defendant was shown a bankers cheque for RM160,000, as evidence that the purchaser was serious about proceeding with the purchase of the property. Under cross-examination, Ong Chin Hwa (PW3) accepted that the money for the bankers cheque had come from one of their directors, ie, PW4 who had advanced his own money. This should have prompted the defendant to reconsider and postpone the auction and to inquire whether the market value opined in their valuer's report was seriously flawed and seek a further valuation.

[30] In my judgment, this submission is untenable. There is no obligation on a chargee to postpone an auction and seek a further valuation in the absence of any challenge to its valuation. In this regard, it is important to note that in July 2013, the plaintiffs had sought to postpone the application for an order for sale on the same ground that they had a potential purchaser.

Charged Property

[31] The property in the instant case were Malay reserve lands located in an undeveloped part Teluk Intan. It was vacant land that was overgrown with shrubs. The evidence disclosed that the comparables used by PW1 and PW5 to determine market value were in fact houses in developed areas and which were not Malay reserve lands. It was common ground that there were no exact comparables for the subject property to be assessed. It was also common ground that the value of a Malay reserve land was lower than a non-Malay reserve land.

[32] On the evidence, I find that the plaintiffs have failed to show that the valuation done by the defendant's valuer is flawed and did not represent the true market value of the property at the time of the sale. It follows therefore, that the plaintiffs argument that the bank acted in breach of its duties by failing to seek a further valuation is without any basis and must be rejected.

Conclusion

[33] In the result, I dismissed the claim with costs of RM20,000.